IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2930 OF 2003
IN
SUMMARY SUIT NO.878 OF 2001

Motilal Manshi Shah ..Plaintiff

Vs.

Suryakant K.Sheth ..Defendant

Mr.N.G.Thakkar i/b Mr.Y.R.Shah for the plaintiff

Mr.Virag Tulzapurkar i/b M/s.Shah and Sanghavi for the defendant no.1 and 3

Ms.Madhavi Diwan i/b Ms.Manisha Kapadia for the defendant no.2

CORAM : S.U.KAMDAR, J
DATED : 20TH FEBRUARY, 2006

ORAL JUDGMENT:

1. The present notice of motion has been initiated inter alia for seeking relief of appointment of Court Receiver, High Court, Bombay and / or granting of Interim Order of restraining the defendant from alienating, encumbering developing any tenancy right or creating new tenancy or parting with possession of the suit property being a plot of land along with the

building standing thereon known as "Irla Sadan" situated at Irla, Ville Parle (West), Bombay -56. Some of the material facts of the present case briefly enumerated are as under:

2. The suit has been filed interalia seeking a declaration that there is a valid and subsisting agreement in respect of a suit property dt.8.9.00 being Ex.B to the plaint and further reliefs of specific performance of the said agreement dt.8.9.00 is sought. The plaintiff has also claimed that a deed of assignment executed by and between the defendant no.1 and defendant no.3 to be declared as void and fabricated document and the same should be cancelled by this court.

3. The plaintiff in the present case is claiming a specific performance of an agreement supposed to have been reduced in writing. The said Ex.B-1 is a writing in a nature of a receipt. It interalia states that a deal is entered into between Motibhai and Suryakantbhai in the presence of one Vijay Javeri in respect of the building, Irla Sadan for a total sum of Rs.36,27,000/-, out

of which Rs.1,27,000/- has been paid by way of earnest money. It further provides that balance amount of Rs.35,00,000/- shall be paid against the clearance of official documents and legal paper.

4. There is no dispute about the said receipt. However, the subsequent correspondence which has been entered into between the parties interalia states that there was no final agreement arrived at between the parties and the matter was only at a negotiation stage. The receipt Ex.B-1 does not spell out at all any essential terms and conditions which are necessary for the purpose of a concluded, valid and binding agreement arrived at between the parties. The receipt does not mention the date for possession, the date of completion of sale and various permissions which are required to be obtained. On 14.11.00 a letter was addressed by the advocate of the defendant to the plaintiff which interalia specifically stipulates that the matter was still at the negotiation stage. Para 2 of the said letter states as under:

"There were negotiations between yourself

and our client for the sale of the above property. To show your bonafides, you have paid Rs.1,27,000/- as token deposit pending negotiations. We have on aforesaid basis prepared the following documents."

5. Not only that but plaintiff himself addressed a letter on 18.11.00 to the advocate of the defendant interalia stating therein that the negotiations are still in progress. The subject of the said letter itself reads as negotiations for sale of property and in para 4 of the letter the plaintiff himself has stated that he is ready and willing to purchase the property as per the negotiations dt.8.9.00 recorded in Gujarati being Ex.'B' to the plaint. Thus, the plaintiff himself by his letter dt.18.11.00 has admitted that the said transaction was at the negotiation stage and that receipt dt.8.9.00 is described by the plaintiff as a step in negotiation rather than complete and binding agreement.

6. It is the case of the defendant that the

matter was at the negotiation stage all throughout. He has further contended that the same is evident by virtue of the letter dt.23.11.00 along with which the deed of assignment was forwarded. He has further contended that before the agreement could be finalised the society by letter dt.9.12.00 refused to grant permission. The said letter dt.9.12.00 has been forwarded by the defendants advocate to the plaintiff in which it is interalia mentioned that unless certain steps are taken by the plaintiff the society will not grant permission to transfer the said flat in favour of the plaintiff herein.

7. There is no dispute that the said letter dt.09.12.00 was forwarded by the defenant's advocate to the plaintiff. It is the case of the defendant that inspite of the fact that the said letter was sent plaintiff did not take any steps to comply with the requirements of the society for transfer of the flat and ultimately therefore on 23.2.01 defendant forwarded a refund of the said cheque of Rs.1,27,000/- which was received by the defendant on 8.9.00 as earnest money. It is a case

of the plaintiff that subsequent to termination of the agreement, plaintiff entered into a deed of assignment in favour of defendant no.3 and has transferred their right, title and interest in favour of defendant no.3.

8. The learned counsel for the plaintiff has vehemently contended that in fact there was no negotiation but final, concluded and binding agreement was arrived at on 8.9.00. He has further contended that the correspondence describing the transaction of 8.9.00 as negotiation and should be ignored as infact all essential terms and conditions of the agreement has been duly agreed upon in the writing dt.8.9.00. He has further contended that defendant no.1 in the present case is a dishonest litigant in as much as he has relied upon a fabricated document of a deed of assignment in favour of defendant no.3. He has also drawn my attention to the stamp papers on which the said document has been executed and has shown various discrepancies therein on the basis of which he has contended that the so-called assignment conferred by the defendant no.1 on defendant no. 3 is

baseless, fabricated and therefore should be ignored by this court.

9. In my opinion, before I advert to the question of validity or otherwise of the deed of assignment between defendant no.1 and 3, plaintiff must make out a prima facie case of entitlement of specific performance of the so called agreement dt.8.9.00. In so far as the aforesaid contention is concerned, I am of the view that there is no valid, binding and concluded contract by and between the parties. Receipt dt.8.9.00 does not contain all the terms and conditions which are essential for the purpose of arriving at a final, concluded and binding agreement as mentioned above. The writing is lacking in respect of terms and conditions pertaining to possession, completion of agreement, and even date and time by which balance payment is to be paid. It also lacks particulars in respect of various permissions which are required to be obtained including permission of the society for the transfer of the said land and building.

10. Apart from the aforesaid on the plaintiff’s

own saying, the said writing dt.8.9.00 was only indicative of negotiations and not a finally concluded and binding agreement. In a letter dt.18.11.00 plaintiff himself specifically stated that the negotiations were conducted on 8.9.00 and as a step of further negotiations the said receipt was executed. Once the plaintiff having himself described the receipt as a step in negotiation, the question of holding that the said receipt dt.8.9.00 indicates any final and binding agreement being executed between plaintiff and defendant no.1 does not arise. I am also of the further opinion that the specific performance being discretionary remedy on the aforesaid facts, it is not legally permissible to exercise even a prima facie discretion in favour of the plaintiff herein when admittedly out of Rs.35.0 lacs, only Rs.1,27,000/- is paid and there is no substantial evidence of legal and binding agreement arrived at by and between the parties. Furthermore, it is also not in dispute that defendant did not comply with the terms and conditions of the letter dt.9.12.00 which was issued by the society. Thereafter society infact rejected the application of defendant no.1

by letter dt.30.01.01 which has been produced by defendant no.1 in his affidavit in reply at Ex.4 which interalia indicates that for non-compliance of the terms stipulated in letter dt.9.12.00 society has refused to grant permission to transfer the said flat premises in favour of the plaintiff herein.

11. It is also not disputed that there cannot be any transfer of the premises without the permission of the society and the society having refused permission, the so-called contract can never be concluded by and between the parties. In that light of the matter, I am of the opinion, that the plaintiff has made out no prima facie case for grant of any relief in the present notice of motion and therefore, motion is liable to be dismissed. In my opinion, it is not necessary to go into the second limb of the argument by the plaintiff that the assessment between defendant no.1 and 3 is invalid and fabricated document in view of my finding that the plaintiff has not made out any prima facie case in his favour for grant of injunction.

12. In that light of the matter, I dismiss the notice of motion. However, there shall be no order as to costs.